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No. 368. OCTOBER TERM, 1930.

IN THE

# Supreme Court of the United States

THE SUSQUEHANNA POWER COMPANY, Appellant,

v.

STATE TAX COMMISSION OF MARYLAND, Appellee.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND, APRIL TERM, 1930, GENERAL DOCKET NO. 38.

STATEMENT AS TO JURISDICTION ON APPEAL UNDER RULE 13 SECTION 1.


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# In the Supreme Court of the United States.

OCTOBER TERM, 1930. No. 368.

*The Susquehanna Power Company, Appellant,*

v.

*State Tax Commission of Maryland, Appellee.*

APPEAL FROM THE COURT OF APPEALS OF MARYLAND, APRIL TERM, 1930, GENERAL DOCKET No. 38.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The Appellant hereby disclosing the basis on which it contends this Honorable Court has jurisdiction to review on appeal the judgment below, respectfully states:—

A.

This appeal is under Title 28 U. S. C. A. Section 344 (Jud. Code Section 237 amended).

Subsection (a)—"A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is

drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a Writ of Error." [Now an appeal under the Act of January 31, 1928, abolishing Writs of Error, as amended by the Act of April 26, 1928. (U. S. C. A., 1929 Cumulative, Title 28 Secs. 861a, 861b) 275 U. S. at 646, 647.]

B.

This appeal is from a final judgment of the Court of Appeals of the State of Maryland, the highest Court of the State, filed June 12, 1930 (Rec. 488), and the application for appeal to this Court was presented to the Chief Judge of the Court of Appeals of Maryland on the 10th day of July, 1930 (Rec. 478), and on the same day an Order thereon of the Chief Judge of said Court granted said appeal.

C.

THE NATURE OF THE CASE AND RULINGS BELOW.

1. *The nature of the case.*

The Appellant, a corporation of Maryland, under one of its charters, the Act of the General Assembly of Maryland of 1908, Chapter 268 (Rec. 4-5, 431), and vested with a license from the Federal Power Commission (Rec. 443), hereinafter referred to, by virtue of said license, constructed and is operating since 1928 a dam across the Susquehanna River, between Harford and Cecil Counties, Maryland, known as the "Conowingo Dam," (see Topographical Map, U. S. Coast and G. Survey), located about six (6) miles below Mason and Dixon's Line, backing the water of the Susquehanna River to the tail race of the "Holtwood Dam" of the Pennsylvania Water and Power Company, a corporation of Pennsylvania, across the river between York and Lancaster Counties, Pennsylvania. This

pool and backwater, created by the Appellant's Conowingo Dam in Maryland, is:—

(1) Length in Pennsylvania, 42,560 lineal feet (about 8 miles); in Maryland, 28,740 lineal feet (about 5½ miles), that is to say, 59.7% is in Pennsylvania, and 40.3% in Maryland;

(2) The area of the pool is 9116 acres; 35% in Maryland, 64% in Pennsylvania;

(3) As to the head, about 50% arises in Maryland, and 50% in Pennsylvania;

(4) As to the drainage basin, 33,000 square miles in Pennsylvania and New York, and 65 square miles in Maryland;

(5) At the dam (about 4608 feet long, R. 298), the depth of the pool is about 90 feet, and at the Mason and Dixon's Line about 58 feet;

(6) The acreage of the pool and backwater in round numbers is about,—Pennsylvania, 4900 acres; Maryland, 4400 acres; Harford County, Maryland, 2110 acres, assessed as "submerged lands" by the State Tax Commission of Maryland; Cecil County, Maryland, 2314 acres, assessed as "submerged lands" (Rec., Roux, witness, 145, Rec. 10, 13, 14, 17, 18, 19, 21, 24, 27, 29, 31).

The Dam was constructed under authority of a license from Federal Power Commission.

"The conclusion is that this act (Federal Water Power Act) authorizing the construction of dams in navigable streams to impound the water, where rocky or shoaly conditions obtain, for the purpose of improving navigation by the slack water method does not offend the Constitution. It was within the power of Congress to create a Board called the Water Power Commission, to carry out the purpose of Congress, and to provide that such Commission should select its Licensees as a proper Federal Agency to carry out

the administrative detail of this general plan wherever applicable for the improvement of navigation."

(1922) Alabama Power Company *v.* Gulf Power Co., 283 Fed. 606, 620.

On the 20th of February, 1926, by virtue of the said license from the Federal Power Commission (Rec. 443), under the Act of Congress of 1920, Chapter 285, U. S. C. A. Title 16, Chapter 12, Federal Water Power Act, the Appellant became a Federal Agency and Instrumentality. The County Commissioners of Harford County assessed for 1929 (Rec. 16, 17, 18, 19, 20, 21, 22-29) the backwater or pool from said dam, covering 2110 acres in Harford County alone, under the name of "submerged lands and rights" at $6,620,786. On Appellant's appeal from the County Commissioners to the State Tax Commission (Rec. 30, 10), the assessment on the 2110 acres of the pool, called by the Commission "submerged lands," was reduced to $2,349,300. (Rec. 472). This last assessment by the Commission was appealed by the Appellant to the Circuit Court for Harford County (Rec. 4-9), and by it affirmed (Rec. 473), and thence appealed to the Court of Appeals of Maryland (Rec. 474), and by it affirmed June 12, 1930, although at the first opportunity, the Appellant protested the said Order of Assessment of the County (Rec. 23) and of the Tax Commission (Rec. 468-472), and repeated its protest before the Circuit Court (Rec. 4), and later before the Court of Appeals, on the ground that the levy of taxes thereunder upon the Appellant was in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. The entire assessment by the said Tax Commission of the "submerged lands" for the year 1929 is:—

| | |
|---|---|
| Harford County, 2110 acres, ..... | $2,349,300. |
| Cecil County, 2314 acres, ..... | 2,357,540. |
| "Submerged lands" in both Counties, | $4,706,840. |

In taxing the pool as "submerged lands," the State Tax Commission assessed them at *100%* of a valuation claimed to be excessive although at the same time assessing unflooded lands at only *60%* of their value (Rec. 171-172, 180). The present appeal of Appellant is taken from the assessment by the State Tax Commission on 2110 acres of the pool, created by the dam, called "submerged lands," in Harford County of $2,349,300., at about $1113. per acre. The assessment upon other property of the Appellant in Harford County was not appealed from.

2. *The rulings below:—*

(*a*) The opinion of the Court of Appeals misinterprets entirely the basis and extent of the Federal Water Power Act, and in effect declares that Act of Congress unconstitutional. If, for no other reason, the opinion of the Court of Appeals (Rec. 489), should be reversed.

Alabama Power Co. *v.* Gulf Power Co., 283 Fed. 606.

(*b*) The Court of Appeals of Maryland, as early as 1916, decided that the Susquehanna River was a navigable river (Rec. 497).

Havre de Grace *v.* Harlow, 129 Md. at 272-277.

And at page 278 held,

> "By reason of the nature of the grant given (by Act of General Assembly 1908, Chapter 268), it remains within the power of the legislature and State, whenever it shall deem it necessary for the purposes of navigable commerce to require such provision (locks) to be made."

If the Desplaines River is navigable, so is the Susquehanna.

Economy Light & Power Company *v.* United States, 256 U. S. 113. And see U. S. C. A. Title 16, Chapter 12, Section 796, for a Congressional definition of navigable waters.

(*c*) The opinion of the Court of Appeals errs when it states that:—

> "The Power Company is not such a Federal Agency as is by its very nature exempt from State taxation. Its capacity to perform such duties and functions in the service of the Federal Government as are imposed upon it, either by its own acts or by law, will not be impaired by the imposition upon it of its proportionate share of the public taxes of the State."

By Section 7 of the charter of the Company, Laws of Maryland 1908, Chapter 268, the State reserved the power to tax the gross receipts of the Company at 1½%. Congress under its absolute power, by the Federal Water Power Act (U. S. C. A. Title 16, Chapter 12) vested the United States, not only with a future contingent power and right to acquire the "complete unit" and project at the expiration of fifty years (Sections 807, 799), but also with the present power and right to acquire immediately any part of the project needed to complete navigation facilities (Section 804), and also by Section 803 Subsection e, the power to compel the Appellant to pay to the United States reasonable annual charges for the cost of administration of the Act.

The correlative duties, which will not be impaired according to the opinion of the Court below, and which are imposed on the Appellant by the Act and License, are:—

| *Duties in Course of Performance.* | *Duties Subject to Immediate Call by United States for Performance.* |
|---|---|
| Section 803. | Section 804. |
| Cost of maintenance of project works for navigation and transmission, cost of renewals and replacements, depreciation reserves. | To construct at its own expense a lock or locks or other structures for navigation; furnish the United States, free of cost, power for operation of navigation facilities. |
| Expense of protection of life and health. | |

*Duties in Course of Performance.*

Section 803.

Liability for damages to property of others by maintenance and operation.

Annual charges payable to United States for administration of Act.

Liability to United States for expropriation of excessive profits until amortization begins.

To operate works so as not to impair navigation, and necessarily including because of the exceedingly variable flow of the River, the maintenance out of earnings, either an equalization of Flow Reserve, or the investment of additional capital for construction of Storage Reservoirs.

Section 813.

Not to claim any value for the rights granted it (under the License) by the Federal Power Commission or by the Federal Water Power Act.

*Duties Subject to Immediate Call by United States for Performance.*

Sections 804, 811.

Control of the pool by the Secretary of War.

To maintain lights and signals required by Secretary of War.

To construct the balance of the Water Power development in excess of the original seven units as Federal Power Commision may direct. (License R. 452, Sec. c.)

License Art. 15 (Rec. 455), United States retains right to use water in such amount for navigation as Secretary of War may determine.

Section 809.

To permit United States to enter upon and take possession of project for the safety of United States.

Section 803. Sub-Section e.

To pay excess profits to United States.

It is submitted that the duties which may hereafter be imposed by the United States on Appellant are more imminent than "meaningless" possibilities or dreams, as ruled by the Court of Appeals, and are not remote in view of the "canalization" of the River now in actual process of consummation, by private capital, that is to say:—

(*a*) The contiguity of the fourteen-mile pool of Appellant's Conowingo Dam with the tail race of Pennsylvania Water and Power Company's Holtwood Dam (appendix Map);

(*b*) The contiguity of the eight-mile pool of the Pennsylvania Water and Power Company's Holtwood Dam with the tail race of The Safe Harbor Water Power Corporation's Safe Harbor Dam, now under construction across the River at Else Island;

(*c*) The ten-mile pool of the Safe Harbor Dam which will extend to the old Susquehanna and Tide-Water Canal Dam across the River just below Columbia (Lancaster County) and Wrightsville (York County);

(*d*) The existing dam of the York Haven Company at York Haven, Conewago Falls (York County), ten miles above Columbia.

Since the United States has the present power and right to acquire so much of the project lands as may be needed to complete navigation facilities, with the further power in view of such upstream developments on the River, to call on Appellant for the performance of additional duties involving large expenditures by Appellant, it seems clear that now, and not fifty years hence, the United States is vested, not solely with a contingent interest in the "complete unit and project" whereof the pool and so-called "submerged lands" are expressly made a part by the description in the License, but with

> "A power coupled with an interest which is the possession of a right in the subject over which the power is to be exercised that makes the interest."
>
> Wilson *v.* Snow, 228 U. S. 217, at 224.

And further such interest as the United States has in that "complete unit and project" and in its necessarily and expressly included pool and so-called "submerged lands" connotes the future uses and duties demanded by the United States when and as they arise.

(1916) Utah Power & Light Co. *v.* United States, 243 U. S. 389 (s. c. 230 Fed. 328, at 336).

The consideration to the United States for the grant of the License to Appellant was its development and maintenance of the navigable capacity of this particular river, for the fact is that the Secretary of War reported to Congress (H. R. Doc. No. 219, 58th Congress, Second Session) the prohibitive cost to Congress to attempt a development on this river. That Report was one of the moving reasons for the passage of the Federal Water Power Act.

And the consideration to Appellant for the capital expenditures was the incidental development of electric energy from the surplus water not required by the United States to maintain the facilities for navigation. The License to Appellant having been accepted is the Contract between it and the United States, which Appellant must continue to perform or submit to forfeiture.

(1922) Alabama Power Co. *v.* Gulf Power Company, 283 Fed. 606, at 615.

But the opinion below ignores the rulings of this Court:—

A State tax cannot be

"derogatory to the dignity, subversive of the powers or repugnant to the paramount authority" of the United States.

Macallen Co. *v.* Massachusetts, 279 U. S. 620, at 628.

The effect of the State tax upon a Federal function cannot

"burden or interfere with the exertion of a national power or make it a source of revenue."

(1928) Panhandle Oil Co. *v.* Mississippi, 277 U. S. 218, at 221.

In view of the actual developments and developments now in course of construction, upstream on this river, the instant tax on the "submerged lands" cannot be ruled valid as

"an interference too remote."

Panhandle Oil Co. *v.* Mississippi, *idem*, at 225.

"What Government instrumentalities will be held free from State taxation though Congress has not expressly so provided, cannot be determined apart from the purpose and character of the legislation creating them."

(1927) Shaw *v.* Oil Corporation, 276 U. S. 575, at 578.

"Without Congressional consent no federal agency or instrumentality can be taxed by State authority. 'With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the State's inability to interfere has been regarded as established since McCulloch *v.* Maryland, 4 Wheat. 316.'"

(1925) Jaybird Mining Co. *v.* Weir, 271 U. S. 609, at 613.

"While it is evident that in one aspect the exemption must finally depend upon the effect of the tax upon the functions of the Government alleged to be affected by it, still the nature of the Governmental Agencies or the mode of their constitution, may not be disregarded, in passing on the question of tax exemption, for it is obvious that an agency may be of such a character or so intimately connected with the exercise of a power,

or the performance of a duty by the one Government that any taxation of it by the other, would be such a direct interference with the functions of Government itself as to be plainly beyond the taxing power."

(1925) Metcalf *v.* Mitchell, 269 U. S. 514, at 524.

"The limitation upon the taxing power of each (Federal and State) so far as it affects the other, must receive a practical construction which permits both to function with a minimum of interference, each with the other." *Idem*, pp. 523-524.

(*d*) The tax in question is assessed in terms on "submerged lands" on which the water of the pool is held by the dam. The Appellant has no property in the pool, which is subject to any direct tax at all, either Federal or State, and the taxing of the "submerged lands" is nothing more than a device to reach a taxation of the pool, *i. e.*, the flowing water of the river, that cannot be taxed.

U. S. *v.* Chandler-Dunbar Co., 229 U. S. 53.

The Appellant, by virtue of its charter, had express power to dam the river and to submerge the bed of the stream, that is to say,—to create the pool "in aid of the powers of Congress" (Section 5). The Appellant created the pool. The Appellant is a riparian proprietor of both shores of the river, but the Appellant's inchoate right to dam the river and create the pool was not complete until the grant of the License from the United States. And further by said Act and License, the easement of the Appellant under its charter, was established as a Federal highway, and by virtue of the requirement of locks, enlarging the earlier declarations of the river as a public highway under the Acts of Pennsylvania of 1771 and 1785, and of Maryland of 1797, Chapter 99, and by the Federal Water Power Act, the Appellant's easement over the pool is not

one of absolute and exclusive use (as the opinion of the Court of Appeals holds), but is qualified and subject to the express terms of the Act, which vest in the United States the present interest and continuing control above referred to.

Since the Appellant (and its predecessors) is a riparian proprietor on both shores of the River and by the Act of 1908 as shown, acquired permission from the State of Maryland to dam and submerge the bed, there was no necessity to apply for and secure from the State of Maryland warrants and patents for the title to the bed of the River to enable it to create the Pool by the use of the flow of the River. The Appellant and its predecessors did acquire patents for many islands and rocks in the River, both above and below the dam merely as a protection against title in others which might require condemnation.

The islands and rocks and bars included within its warrants in fact operate merely as security from the State for priorities of appropriation of sites for dams and tail race under the Act of 1908, and for priority of application for the Appellant's Federal License.

N. J. *v.* Sargent, 269 U. S. 328, at 339.

In an effort to avoid the ruling in the Chandler-Dunbar case, 229 U. S. 53, that no one can have a property right in the flow of the river, even if he owns to "the middle thread" thereof, the opinion of the Court of Appeals sets up that private ownership may be had in the bed of this river, and cites Brown *v.* Kennedy, 5 H. & J. 195, the facts of which do not fit the instant case of a flowing river, for there Jones' Falls in Baltimore City had been diverted entirely from its bed into a canal and the ejectment was between the contiguous proprietors *over the then title to the exposed dry bed*, that is to say:—

> "The State has the right to grant the soil covered by navigable water, subject to the public or common right of navigation and fishery, and inferentially that

> a title originating in a patent issued under general law from the Land Office, attached to the land and gave a right of possession *when the waters ceased to exist.*"
>
> (1898) Morris *v.* U. S., 174 U. S. 196, at 238;
> (1906) Baltimore City *v.* Steamboat, 104 Md., at 492-3.

The Chandler-Dunbar Case has decided that the Appellant's title to the bed of the Susquehanna River is a qualified one, not absolute, and the water flowing over it is not subject to taxation by the State of Maryland or any other sovereignty.

(*e*) The concluding error of the opinion of the Court of Appeals is:—

> "Assuming that neither the license nor the franchises may be taxed, the value they gave to Appellant's project by permitting it to operate, is taxable."

For, by the Federal Water Power Act, U. S. C. A. Title 16, Chapter 12, Section 813:—

> "No value shall be claimed or allowed for the rights granted by the Commission, or by this chapter."

If the value of the License and franchises granted by the Federal Government to the flow of the river, subject to all the duties demanded by the Federal Government, as heretofore shown, may not be claimed by the Licensees for rate making purposes, then the State cannot indirectly put a tax valuation on them by taxing them as "submerged lands" at $1113. an acre. It may be noted in passing that the adjoining unsubmerged lands are assessed at from $10. per acre to $50. per acre.

## D.

### THE CASES BELIEVED TO SUSTAIN THE JURISDICTION.

The following decisions are believed to sustain the jurisdiction of this Court of the appeal of the Appellant:—

| | |
|---|---|
| Economy Light & Power Company *v.* United States, 256 U. S. 113. | The Susquehanna River is a navigable river. |
| King *v.* Augusta, 277 U. S. 100, 104, 108. | An Order of a Tax Commission is a Statute of the State. |
| Wilson *v.* Snow, 228 U. S. 217, 224. | The United States has something more than a remote contingent interest. |
| Alabama Power Co. *v.* Gulf Power Co., 283 Fed. 606, 615, 620. | The Federal Water Power Commission may select its licensee as proper Federal Agency. |
| Utah Power & Light Company *v.* U. S., 243 U. S. 389. | The future uses of the United States as they arise. |
| Macallen Co. *v.* Massachusetts, 279 U. S. 620, 628. | A State tax cannot be repugnant to the paramount authority of Congress. |
| Panhandle Oil Co. *v.* Mississippi, 277 U. S. 218, 221. | A State tax cannot make a Federal function a source of revenue. |
| Shaw *v.* Oil Corporation, 276 U. S. 575, 578. | The purpose of the Federal Water Power Act determines whether Appellant is a Federal Agent. |
| Jaybird Mining Co. *v.* Weir, 271 U. S. 609, 613. | Congressional consent is necessary to tax a Federal instrumentality. |

| | |
|---|---|
| Metcalf & Eddy *v.* Mitchell, 269 U. S. 514, 524. | The character of the Agent and its duties may prevent the interference of a State tax. |
| U. S. *v.* Chandler-Dunbar Co., 229 U. S. 53, 69. | Appellant has no property in the water of the pool which can be reached for taxation by the State of Maryland. |

The jurisdiction of this Court would seem to be clear.

Respectfully submitted,

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